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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 577

BOB GRANVILLE POINTER, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR RESPONDENT

OPINIONS BELOW

The Opinions of the Court of Criminal Appeals of Texas (R. 61, 66) are reported at 375 S.W.2d 293 (1964).

JURISDICTION

The Judgment of the Court of Criminal Appeals of Texas was entered on December 18, 1963 (R. 61); Motion for Rehearing was overruled on February 12, 1964 (R. 66); the Court of Criminal Appeals of Texas issued its Mandate on the 28th day of February, 1964; Petition for Certiorari and Motion for Leave to Appeal in Forma Pauperis was filed on March 23, 1964, in this Court and docketed as No. 1207, Misc., subsequently re-docketed as No. 10 Misc.; Certiorari and Leave to Appeal in forma pauperis were granted October 12, 1964. The Jurisdiction of this Court rests on 28 U.S.C., § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Sixth and Fourteenth Amendments to the Constitution of the United States. The pertinent statutory and constitutional provisions are printed in the Appendix, infra.

QUESTIONS PRESENTED

I.

Where the purpose of an examining trial under Texas law is to determine whether the Defendant is to be discharged, committed to jail, or admitted to bail; is this such a "critical stage" of the proceedings as to deny him his constitutional rights where he is not represented by an attorney?

II.

Under the facts of this case did Petitioner intelligently and understandingly waive his constitutional rights to have counsel?

STATEMENT

On the 16th day of June, 1962, Kenneth W. Phillips was employed as manager of a 7-11 Food Market Store at 1902 West 43rd Street, in Houston, Harris County, Texas, and on that date the Petitioner entered the grocery store at approximately 10:45 p.m., produced a pistol and demanded money from Mr. Phillips. Petitioner was charged with the robbery by assault of Kenneth W. Phillips.

Prior to return of the indictment, an Examining Trial (Preliminary Hearing) was held in Justice

Court, Precinct No. 1, Harris County, Texas, on June 25, 1962, for the Petitioner and a co-defendant, Lloyd Earl Dillard. Assistant District Attorney Don Allen Weitinger represented the State of Texas at the hearing (R. 14). Petitioner was not represented by counsel at the Examining Trial (R. 28). The testimony of Kenneth W. Phillips was reduced to writing by the court reporter in question and answer form (R. 55, 57) and although the record does not show any cross-examination of Mr. Phillips by the Petitioner, it is reflected that Petitioner did in fact cross-examine some of the witnesses (R.16). Petitioner at no time requested that counsel be appointed to represent him at the Examining Trial.

Petitioner was indicted for the offense of robbery by assault on the 16th day of July, 1962 (R. 1). On August 14, 1962, this case was called to trial and passed on behalf of Petitioner because he did not have an attorney to represent him at that time (R. 6). On September 17, 1962, this case was once again called for trial but on motion of Petitioner was passed once again to give him and his family an opportunity to hire an attorney to represent him (R. 6, 8). At that time the Trial Court appointed Charles W. Gill, a member of the Houston Bar, to represent Petitioner in the event that he did not obtain counsel of his own choosing (R. 6). On November 6, 1962, the Petitioner was put to trial in Criminal District Court of Harris County, Texas for the offense of robbery by assault (R. 11). Petitioner was represented by Mr. Charles W. Gill, counsel appointed by the Trial Court, and by C. C. Devine, counsel of his own choosing (R. 10).

At the Examining Trial (Preliminary Hearing) Kenneth W. Phillips testified on behalf of the State

of Texas and was cross-examined by Petitioner's accomplice. (R. 25; State's Ex. 1, R. 55, 56, 57.)

The complaining witness, Kenneth W. Phillips, at the time of the trial had moved permanently to California (R. 12). He had taken up residence and had obtained a job in the State of California (R. 13). He did not intend to return to Texas (R. 13). At the trial the State of Texas was permitted to reproduce the testimony of the complainant, Kenneth W. Phillips, through the court reporter who had transcribed the proceedings in Judge W. C. Reagan's Court in the case of the *State of Texas v. Bob Granville Pointer* (R. 19, 23, 24, 25).

On the 7th day of November, 1962, notwithstanding his plea of not guilty, Petitioner was convicted by a jury of the offense of robbery by assault and sentenced to life imprisonment (R. 58). On January 4, 1963, Petitioner was sentenced by the Trial Court and at that time gave notice of appeal to the Court of Criminal Appeals of Texas (R. 59, 60).

The Court of Criminal Appeals of Texas, the highest Court having jurisdiction in criminal cases in this State, affirmed the conviction of the Petitioner on the 18th day of December, 1963. The Court stated in part as follows:

> "His first contention is that the court erred in permitting the state to introduce in evidence as state's exhibit #1 a portion of the testimony given by the injured party, Kenneth W. Phillips, at an examining trial held in Justice Court, Precinct No. 1, of Harris County, on June 25, 1962, for the appellant and a co-defendant, Lloyd Earl Dillard.
>
> "Appellant insists that a proper predicate was not laid under Arts. 749 and 750, V.A.C.C.P., to

reproduce the testimony, because the state did not show that the witness resided out of the state. The record reflects that prior to admitting the injured party's examining-trial testimony in evidence, his sister testified that since the date of the robbery he had moved to California, where he was employed and had taken up residence, and that he was in California at the time of the trial. Her testimony was sufficient to show that the witness resided out of the state. Corn v. State, 158 S.W.2d 503; Norton v. State, 186 S.W.2d 347. It is also contended that the examining-trial testimony should not have been admitted because the proof fails to show that the state attempted to avail itself of the provisions of Art. 486a, V.A.C.C.P., being the Uniform Act to secure attendance of witnesses from without the state.

"In Webb v. State, 268 S.W.2d 136, it was recognized (fol. 277) that the exercise of diligence is not required of either the state or an accused before taking advantage of the right to reproduce testimony of a witness out of the state, under the terms of Arts. 749 and 750, supra. In that case, a claim made by the state that an accused should be denied the right to reproduce testimony because he did not avail himself of the Uniform Attendance of Witnesses Act, Art. 468a, V.A.C.C.P., was rejected.

"Appellant also contends that, because he was not represented by counsel at the examining trial, the reproduction of such testimony and its admission in evidence constituted a denial of due process to him under the Fourteenth Amendment to the Constitution of the United States.

"With this contention we do not agree. The examining trial was held prior to return of the indictment against appellant and was not a part of the trial in which he was convicted. An examining trial, under Arts. 245 to 266, V.A.C.C.P., is for the purpose of determining whether the defendant

is to be discharged, committed to jail, or admitted to bail.

"Art. 494, V.A.C.C.P., provides for the appointment of counsel for an accused charged with a felony, when it is made known to the court, at an arraignment or any other time, that he is too poor to employ counsel.

"Art. 10a, V.A.C.C.P., provides for the appointment of counsel for an accused in a prosecution for an offense less than capital, upon entering a plea of guilty or plea of nolo contendere and waiving trial by jury.

"There is no statutory provision in this state for the appointment of counsel for an accused prior to indictment. We have examined the authorities cited by appellant and do not deem them here controlling. In Gideon v. Wainwright, 83 S. Ct. 792, 9 L.Ed.2d 799, the accused was denied the assistance of counsel at his trial. In Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114, and Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, the accuseds did not have the assistance of counsel at the time of their arraignment. In White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193, the accused was not represented by counsel when he was arraigned at a preliminary hearing and entered a plea of guilty, which was subsequently introduced in evidence against him upon the trial in which he was convicted. Such are not the facts presented in the instant case." (R. 62, 63.)

On Motion for Rehearing, the Honorable Judge McDonald, speaking for the Court, stated:

"Due to appellant's vigorous brief on motion for rehearing, and his reliance on White v. Maryland, 83 Sup.Ct. 1050, we feel it desirable to further clarify our position in distinguishing the instant case. In the White case it was pointed out that the 'preliminary hearing' under Maryland law was as

'critical' a stage as arraignment under Alabama law, citing Hamilton v. Alabama, 82 Sup.Ct. 159. In the Hamilton case it was stated that under Alabama law arraignment is a critical stage in a criminal proceeding in that, '* * * the defense of insanity must be pleaded or the opportunity is lost.' Also, 'pleas in abatement must also be made at the time of arraignment,' and further, 'It is then that motions to quash based on systematic exclusion of one race from grand juries, or on the ground that the grand jury was otherwise improperly drawn must be made.'

"The examining trial in Texas is not such a 'critical stage' in criminal proceedings as it is under the holdings above cited and quoted. As originally set forth in our opinion in this cause, 'An examining trial, under Arts. 245 to 266, V.A.C.C.P. is for the purpose of determining whether the defendant is to be discharged, committed to jail, or admitted to bail.' " (R. 66)

ARGUMENT

I.

The Examining Trial was *not* a critical stage of the proceedings, and the Court was not obligated to appoint counsel to represent Petitioner therein especially in the absence of a request by the Petitioner for an appointment of counsel by the Court.

The Preliminary Hearing, or Examining Trial, as it is commonly called in the State of Texas, is not one in which the accused is called upon to enter a plea, nor is it necessary for him to advance any defenses at this stage of the proceedings. The purpose of such hearing is merely to determine whether there is enough evidence to show probable cause for holding the accused in confinement or admitting him to bail prior to

the time the grand jury considers the case. Our statutes provide that the accused shall have time to procure counsel, Article 245, V.A.C.C.P. The examination may be postponed in order that he may obtain counsel, Article 246, V.A.C.C.P. A magistrate is required to give the accused proper warning before witnesses are examined. The accused is warned that he need not make any statement, but he may do so if he wishes, Articles 247 and 248, V.A.C.C.P.

The statutes contemplate that the prosecution may not even be represented in the Examining Trial, but provides that if anyone representing the prosecution is present, they may have the right to question or cross-examine witnesses. The accused, or his counsel, has the same right. Should no counsel appear, either for the State or for the Petitioner, the magistrate may examine the witnesses; and the accused has the same right, Article 250, V.A.C.C.P.

The testimony of each witness is reduced to writing by or under the direction of the magistrate, and is then read over to the witness and corrections are then made and then he signs his name, Article 253, V.A.C.C.P.

There are distinctions that may be drawn between the present case and the cases of *White v. Maryland,* 373 U.S. 59, and *Hamilton v. Alabama,* 368 U.S. 52.

An examining trial in the State of Texas, pursuant to Article 245, V.A.C.C.P., does not perform the same function as the preliminary trials did in the cases of *White v. Maryland,* supra, and *Hamilton v. Alabama,* supra. In Texas the examining trial is not an arraignment and the accused does not enter a plea. In Texas, an accused is not required to advance any defenses at an examining trial, and a failure to do so does not

preclude him from availing himself from every defense he may have upon the trial of the case.

In *White v. Maryland,* supra, the preliminary hearing in Maryland constituted an arraignment in which the accused was forced to plead to the offense. He entered a plea of guilty without advice of counsel, and later in the trial of his case, the plea of guilty was introduced into evidence against him. In the case of *Hamilton v. Alabama,* supra, the preliminary hearing which was held amounted to an arraignment of the accused. Arraignment, under the Alabama law, was a critical stage in a criminal proceeding because the defendant was required, under Alabama law, at that time to plead the defense of insanity or the opportunity to do so would be lost. In Alabama, various pleas in abatement must be made at the time of arraignment. Motions to quash the indictment, based on the grounds of systematic exclusion of one race from grand juries, must be made at that time, and other defenses may be advanced at that stage of the proceeding or are lost.

The examining trial in Texas is not such a "critical stage" in criminal proceedings as it is under the holdings of the above cited cases. An examining trial, under Articles 245 to 266, V.A.C.C.P., is for the purpose of determining whether the defendant is to be discharged, committed to jail, or admitted to bail. *Childers v. State,* 30 Crim.Rep. 160, 16 S.W. 903.

II.

Should the Court find that Petitioner had a constitutional right to court appointed counsel, Respondent would, show that Petitioner intelligently and understandingly waived such right and that Petitioner's rights were fully protected in: 1. That Petitioner was

confronted by the witness, Kenneth W. Phillips, at the Examining Trial; 2. That the witness, Phillips, was duly sworn and testified under oath at the Examining Trial; 3. That Petitioner was afforded the opportunity to cross-examine Phillips; 4. That Petitioner did in fact cross-examine some of the witnesses at the Examining Trial; 5. That Phillips had permanently left the State of Texas and had obtained a job and permanent residence in the State of California; 6. That Petitioner was no stranger to the legal processes, nor was he lacking in intelligence or understanding of the benefits of counsel, but was in fact acquainted with several lawyers in the community and had in fact employed at least three attorneys to represent him in previous criminal cases in which he was a defendant; 7. That Petitioner failed to request counsel and in fact refused court appointed counsel when tendered.

If an error was committed by the Trial Court in admitting Phillip's testimony which was adduced at the Examining Trial, it was harmless error, because, aside from the testimony of Kenneth Phillips, there was other evidence at the Trial sufficient to support the finding of guilty by the jury. The evidence includes a positive identification of the Petitioner made by an eye-witness to the robbery, Juanita Phillips (R. 34). It also includes the testimony of Officer R. F. Kinsey of the Radio Patrol, K-9 Division, of the Houston Police Department, who testified that he and his dog traced the path of the Petitioner from the scene of the crime to the place of Petitioner's apprehension (R. 42). In addition, there is the testimony of Officer G. J. Durham of the City of Houston Police Department, Robbery Division, who testified that he assisted in the apprehension of the Petitioner, that in the course of

this apprehension, he found upon the person of Petitioner, approximately $81.00 in his billfold, and $65.00 secreted in his right shoe, approximating the sum of $146.00 (R. 49). The record also contains testimony of Jim Stewart Robertson, a private citizen, whose testimony impeached that of the Petitioner to the effect that he had never been in the 7-11 Food Store which he stands convicted of having robbed on the 16th day of June, 1962 (R. 52, 53).

PETITIONER INTELLIGENTLY AND UNDERSTANDINGLY WAIVED THE ASSISTANCE OF COUNSEL AT THE EXAMINING TRIAL

The record shows that Petitioner retained Mr. Sam Hoover, of the Houston Bar, and paid him $600.00 to represent him on a number of cases (R. 4, 5). It is further shown that a Mr. John Cutler, a member of the Houston Bar, represented Petitioner in a prior case (R. 7). It is also shown that Petitioner had made arrangements at one time for Mr. Clyde Gordon, also of the Houston Bar, to represent him in that same case (R. 7). In the instant case, it is shown at (R. 7) that Mr. C. C. Devine had been approached by Petitioner's relatives to see about obtaining his services to represent Petitioner in this case.

On September 17, 1962, after the Court had passed the case on August 14, 1962, because Petitioner had failed to hire counsel, the Court appointed Charles W. Gill to represent Petitioner in the event that he did not employ counsel to represent him at the trial (R. 5, 6, 7). At that time Petitioner gave a very clear indication that he had no desire of being represented at his trial by a court appointed lawyer as is shown by

Petitioner's testimony on cross-examination by the Assistant District Attorney:

"Q. And isn't it a fact that when he came up here to talk to you about this case that you just didn't want to talk to him about it?

"A. I told him—No, Sir. I told him my people were trying to get me a lawyer, then. That's exactly what I told Mr. Gill, that I would let him know. Right then, my people were telling me every week—they were telling me that they were going out to get some money together to get me a lawyer.

"Q. But Mr. Gill did tell you that he had been appointed by the Court to represent you in this case?

"A. Yes, Sir, he did tell me that he had been appointed by the Court.

"Q. And you did refuse to talk to him about your case? That was your choice, wasn't it?

"A. Well, I told him I didn't want to talk to him.

"Q. You told him that you didn't want to talk to him, even after he told you that he was your lawyer and had been appointed by the Court, isn't that right?

"A. I told him that I didn't want to talk to him at that time, that I would let him know if I . . .

"Q. And that has been over a month ago, isn't that right?

"A. Mr. Gill has been up to see me twice, and I told him the same thing both times."

This is a clear indication that Petitioner did not want the services of a court appointed lawyer and relied on his family being able to hire counsel to represent him.

It should be noted that the offense was committed and arrest made on the 16th day of June, 1962, and that the Preliminary Hearing was held on June 25, 1962. Petitioner, who was acquainted with a number of lawyers, had at least nine days from the time of the arrest to the date of the hearing to procure the services of counsel.

Petitioner was by no means a stranger to the legal process, but was experienced in the ways and means of procuring competent counsel, and knowledgeable of his right thereto. He should not now be heard to complain that he was so poor and ignorant of his situation that he could not intelligently and understandingly waive his right to private counsel or to court appointed counsel, if any.

Previous to his trial, Petitioner did not at any time assert that he was a pauper and unable to obtain counsel. Neither did Petitioner at any time, either prior to the Examining Trial or the trial on the merits, ever request the appointment of counsel, but on the contrary, he consistently refused counsel when offered and in fact refused to talk to Charles W. Gill, a leading and highly respected member of the Harris County Criminal Bar, whom the Court had appointed on its own motion to represent Petitioner. Charles W. Gill was appointed by the Court not because Petitioner requested the appointment of counsel or because Petitioner was an indigent, but because the Court had given Petitioner ample opportunities to hire his own lawyer and Petitioner had not done so, and the case had been passed twice previously on motion of the Petitioner for additional time in which to employ an attorney, and the Court, with an already over-crowded

docket, in its discretion felt it necessary to proceed with the case (R. 5, 6, 10).

In *Carnley v. Cochran*, 369 U.S. 506, this Court held that an accused could intelligently and understandingly waive his constitutional rights to counsel.

Respondent urges that if this standard can be met, that it was met in this case where Petitioner did not request counsel but refused same when offered.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Criminal Appeals of Texas should be affirmed.

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CERTIFICATE OF SERVICE

I, Allo B. Crow, Jr., Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I have heretofore entered my appearance in the Supreme Court of the United States in the above captioned cause in behalf of the Respondent; I certify that a copy of the foregoing brief has been forwarded by United States Mail, with first class postage prepaid, to Petitioner's Attorney of Record, Orville A. Harlan, 806 Houston First Savings Building, Houston, Texas 77002.

ALLO B. CROW, JR.
Assistant Attorney General

APPENDIX

Sixth Amendment, Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment, Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1408, Vernon's Annotated Texas Penal Code:

> "If any person by assault, or violence, or by putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary for life, or for a term of not less than five years; * * *"

Article 245, Vernon's Annotated Texas Code of Criminal Procedure:

> "When the accused has been brought before a magistrate, that officer shall proceed to examine

into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel."

Article 246, Vernon's Annotated Texas Code of Criminal Procedure:

"The magistrate may at the request of either party postpone the examination to procure testimony; but the accused shall in the meanwhile be detained in custody unless he give bail to be present from day to day before the magistrate until the examination is concluded, which he may do in all cases except murder and treason."

Article 247, Vernon's Annotated Texas Code of Criminal Procedure:

"Before the examination of the witnesses, the magistrate shall inform the accused that it is his right to make a statement relative to the accusation brought against him, but at the same time shall also inform him that he cannot be compelled to make any statement whatever, and that if he does make such statement, it may be used in evidence against him."

Article 248, Vernon's Annotated Texas Code of Criminal Procedure:

"If the accused desires to make a voluntary statement, he may do so before the examination of any witness, but not afterward. His statement shall be reduced to writing by or under the direction of the magistrate, or by the accused or his counsel, and shall be signed by the accused by affixing his name or mark, but shall not be sworn to by him. The magistrate shall attest by his own certificate and signature to the execution and signing of the statement."

Article 249, Vernon's Annotated Texas Code of Criminal Procedure:

"The magistrate shall, if requested by the accused or his counsel, or by the prosecutor, have all the witnesses placed in charge of an officer, so that the testimony given by any one witness shall not be heard by any of the others."

Article 250, Vernon's Annotated Texas Code of Criminal Procedure:

"If any person appear to prosecute as counsel for the State, he shall have the right to question the witnesses on direct or cross-examination; and the accused or his counsel has the same right. Should no counsel appear, either for the State or for the defendant, the magistrate may examine the witnesses; and the accused has the same right."

Article 251, Vernon's Annotated Texas Code of Criminal Procedure:

"The same rules of evidence shall apply to and govern a trial before an examining court that apply to and govern a final trial."

Article 252, Vernon's Annotated Texas Code of Criminal Procedure:

"The examination of each witness shall be in the presence of the accused."

Article 253, Vernon's Annotated Texas Code of Criminal Procedure:

"The testimony of each witness shall be reduced to writing by or under the direction of the magistrate, and shall then be read over to the witness, or he may read it over himself. Such corrections shall be made in the same as the witness may direct; and he shall then sign the same by affixing thereto his name or mark. All the testimony thus taken shall be certified to by the magistrate."

Article 254, Vernon's Annotated Texas Code of Criminal Procedure:

"The magistrate has the power in all cases, where a witness resides or is in the county where the prosecution is pending, to issue an attachment for the purpose of enforcing the attendance of such witness; this he may do without having previously issued a subpoena for that purpose."

Article 255, Vernon's Annotated Texas Code of Criminal Procedure:

"The magistrate may issue an attachment for a witness to any county in the State, when affidavit is made by the party applying therefor that the testimony of the witness is material to the prosecution, or the defense, as the case may be; and the affidavit shall further state the facts which it is expected will be proved by the witness; and, if the facts set forth are not considered material by the magistrate, or, if they be admitted to be true by the adverse party, the attachment shall not issue."

Article 256, Vernon's Annotated Texas Code of Criminal Procedure:

"A witness attached need not be tendered his witness fees or expenses."

Article 257, Vernon's Annotated Texas Code of Criminal Procedure:

"The officer receiving the attachment shall execute it forthwith by bringing before the magistrate the witness named therein, unless such witness shall give bail for his appearance before the magistrate at the time and place required by the writ."

Article 258, Vernon's Annotated Texas Code of Criminal Procedure:

"After examining the witnesses in attendance, if it appear to the magistrate that there is other

important testimony which may be had by a postponement, he shall, at the request of the prosecutor or of the defendant, postpone the hearing for a reasonable time to enable such testimony to be procured; but in such case the accused shall remain in the custody of the proper officer until the day fixed for such further examination. No postponement shall take place, unless a sworn statement be made by the defendant, or the prosecutor, setting forth the name and residence of the witness, and the facts which it is expected will be proved. If it be testimony other than that of a witness, the statement made shall set forth the nature of the evidence. If the magistrate is satisfied that the testimony is not material, or, if the same shall be admitted to be true by the adverse party, the postponement shall be refused."

Article 259, Vernon's Annotated Texas Code of Criminal Procedure:

"Upon examination of one accused of a capital offense, no magistrate other than a judge of the Court of Criminal Appeals, district court or county court, shall have power to discharge the defendant. Any magistrate may admit to bail, except in capital cases where the proof is evident."

Article 260, Vernon's Annotated Texas Code of Criminal Procedure:

"Where it is made to appear by affidavit to a judge of the Court of Criminal Appeals, district or county court, that the bail taken in any case is insufficient in amount, or that the sureties are not good for the amount, or that the bond is for any reason defective or insufficient, such judge shall issue a warrant of arrest, and require of the defendant sufficient bond and security, according to the nature of the case."

Article 261, Vernon's Annotated Texas Code of Criminal Procedure:

"After the examining trial has been had, the magistrate shall make an order committing the defendant to the jail of the proper county, discharging him or admitting him to bail, as the law and facts of the case may require."

Article 749, Vernon's Annotated Texas Code of Criminal Procedure:

"Depositions taken in criminal actions shall not be read unless oath be made that the witness resides out of the State; or that since his deposition was taken, the witness has died; or that he has removed beyond the limits of the State; or that he has been prevented from attending the court through the act or agency of the defendant; or by the act or agency of any person whose object was to deprive the defendant of the benefit of the testimony; or that, by reason of age or bodily infirmity, such witness cannot attend. When the deposition is sought to be used by the State, the oath may be made by any credible person. When sought to be used by the defendant, the oath shall be made by him in person."

Article 750, Vernon's Annotated Texas Code of Criminal Procedure:

"The deposition of a witness taken before an examining court or jury of inquest, and reduced to writing, and certified according to law, in cases where the defendant was present when such testimony was taken, and had the privilege afforded him of cross-examining the witness, may be read in evidence as is provided in the preceding article for the reading in evidence of depositions."

SUPREME COURT OF THE UNITED STATES

No. 577.—October Term, 1964.

Bob Granville Pointer, Petitioner, *v.* State of Texas.	On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[April 5, 1965.]

Mr. Justice Black delivered the opinion of the Court.

The Sixth Amendment provides in part that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence."

Two years ago in *Gideon* v. *Wainwright*, 372 U. S. 335, we held that the Fourteenth Amendment makes the Sixth Amendment's guarantee of right to counsel obligatory upon the States. The question we find necessary to decide in this case is whether the Amendment's guarantee of a defendant's right "to be confronted with the witnesses against him," which has been held to include the right to cross-examine those witnesses, is also made applicable to the States by the Fourteenth Amendment.

The petitioner Pointer and one Dillard were arrested in Texas and taken before a state judge for a preliminary hearing (in Texas called the "examining trial") on a charge of having robbed Kenneth W. Phillips of $375 "by assault, or violence, or by putting in fear of life or bodily injury," in violation of Texas Penal Code Art. 1408. At this hearing an Assistant District Attorney conducted the prosecution and examined witnesses, but neither of the defendants, both of whom were laymen, had a lawyer. Phillips as chief witness for the State gave his version of

the alleged robbery in detail, identifying petitioner as the man who had robbed him at gunpoint. Apparently Dillard tried to cross-examine Phillips but Pointer did not, although Pointer was said to have tried to cross-examine some other witnesses at the hearing. Petitioner was subsequently indicted on a charge of having committed the robbery. Some time before the trial was held, Phillips moved to California. After putting in evidence to show that Phillips had moved and did not intend to return to Texas, the State at the trial offered the transcript of Phillips' testimony given at the preliminary hearing as evidence against petitioner. Petitioner's counsel immediately objected to introduction of the transcript, stating, "Your Honor, we will object to that, as it is a denial of the confrontment of the witnesses against the Defendant." Similar objections were repeatedly made by petitioner's counsel but were overruled by the trial judge, apparently in part because, as the judge viewed it, petitioner had been present at the preliminary hearing and therefore had been "accorded the opportunity of cross examining the witnesses there against him.". The Texas Court of Criminal Appeals, the highest state court to which the case could be taken, affirmed petitioner's conviction, rejecting his contention that use of the transcript to convict him denied him rights guaranteed by the Sixth and Fourteenth Amendments. 375 S. W. 2d 293. We granted certiorari to consider the important constitutional question the case involves. 379 U. S. 815.

In this Court we do not find it necessary to decide one aspect of the question petitioner raises, that is, whether failure to appoint counsel to represent him at the preliminary hearing unconstitutionally denied him the assistance of counsel within the meaning of *Gideon* v. *Wainwright*, *supra*. In making that argument petitioner relies mainly on *White* v. *Maryland*, 373 U. S. 59, in which this Court reversed a conviction based in part upon evi-

dence that the defendant had pleaded guilty to the crime at a preliminary hearing where he was without counsel. Since the preliminary hearing there, as in *Hamilton* v. Alabama, 368 U. S. 52, was one in which pleas to the charge could be made, we held in *White* as in *Hamilton* that a preliminary proceeding of that nature was so critical a stage in the prosecution that a defendant at that point was entitled to counsel. But the State informs us that at a Texas preliminary hearing, such as is involved here, pleas of guilty or not guilty are not accepted and that the judge decides only whether the accused should be bound over to the grand jury and if so whether he should be admitted to bail. Because of these significant differences in the procedures of the respective States, we cannot say that the *White* case is necessarily controlling as to the right to counsel. Whether there might be other circumstances making this Texas preliminary hearing so critical to the defendant as to call for appointment of counsel at that stage we need not decide on this record, and that question we reserve. In this case the objections and arguments in the trial court as well as the arguments in the Court of Criminal Appeals and before us make it clear that petitioner's objection is based not so much on the fact that he had no lawyer when Phillips made his statement at the preliminary hearing, as on the fact that use of the transcript of that statement at the trial denied petitioner any opportunity to have the benefit of counsel's cross-examination of the principal witness against him. It is that latter question which we decide here.

I.

The Sixth Amendment is a part of what is called our Bill of Rights. In *Gideon* v. *Wainwright*, *supra*, in which this Court held that the Sixth Amendment's right to the assistance of counsel is obligatory upon the States, we did so on the ground that "a provision of the Bill of Rights

which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment." 372 U. S., at 342. And last Term in *Malloy* v. *Hogan*, 378 U. S. 1, in holding that the Fifth Amendment's guarantee against self-incrimination was made applicable to the States by the Fourteenth, we reiterated the holding of *Gideon* that the Sixth Amendment's right-to-counsel guarantee is "'a fundamental right, essential to a fair trial,'" and "thus was made obligatory on the States by the Fourteenth Amendment." 378 U. S., at 6. See also *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52. We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.

It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. See, *e. g.*, 5 Wigmore, Evidence § 1367 (3d ed. 1940). The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the decisions of this Court and other courts* throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases. This Court in *Kirby* v. *United States*, 174 U. S. 47, 55, 56, referred to the

*See state and English cases collected in 5 Wigmore, Evidence §§ 1367, 1395 (3d ed. 1940). State constitutional and statutory provisions similar to the Sixth Amendment are collected in 5 Wigmore, *supra*, § 1397, n. 1.

right of confrontation as "[o]ne of the fundamental guarantees of life and liberty," and "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the Constitutions of most if not of all the States composing the Union." Mr. Justice Stone, writing for the Court in *Alford v. United States*, 282 U. S. 687, 692, declared that the right of cross-examination is "one of the safeguards essential to a fair trial." And in speaking of confrontation and cross-examination this Court said in *Greene* v. *McElroy*, 360 U. S. 474,

> "They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion." 360 U. S., at 496–497 (footnote omitted).

There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. In *In re Oliver*, 333 U. S. 257, this Court said:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in Court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." 333 U. S., at 273 (footnote omitted).

And earlier this Term in *Turner* v. *Louisiana*, 379 U. S. 466, 472–473, we held:

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

Compare *Willner* v. *Committee on Character & Fitness*, 373 U. S. 96, 103–104.

We are aware that some cases, particularly *West* v. *Louisiana*, 194 U. S. 258, 264, have stated that the Sixth Amendment's right of confrontation does not apply to trials in state courts, on the ground that the entire Sixth Amendment does not so apply. See also *Stein* v. *New York*, 346 U. S. 156, 195–196. But of course since *Gideon* v. *Wainwright*, *supra*, it no longer can broadly be said that the Sixth Amendment does not apply to state courts. And as this Court said in *Malloy* v. *Hogan*, *supra*, "This Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." 378 U. S., at 5. In the light of *Gideon*, *Malloy*, and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law. We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that that guarantee, like the right against compelled self-

incrimination, is "to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Malloy* v. *Hogan*, *supra*, 378 U. S., at 10.

II.

Under this Court's prior decisions, the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case. As has been pointed out, a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him. See, *e. g.*, *Dowdell* v. *United States*, 221 U. S. 325, 330; *Motes* v. *United States*, 178 U. S. 458, 474; *Kirby* v. *United States*, 174 U. S. 47, 55–56; *Mattox* v. *United States*, 156 U. S. 237, 242–243. Cf. *Hopt* v. *Utah*, 110 U. S. 574, 581; *Queen* v. *Hepburn*, 7 Cranch 290, 295. This Court has recognized the admissibility against an accused of dying declarations, *Mattox* v. *United States*, 146 U. S. 140, 151, and of testimony of a deceased witness who has testified at a former trial, *Mattox* v. *United States*, 156 U. S. 237, 240–244. See also *Dowdell* v. *United States*, *supra*, 221 U. S., at 330; *Kirby* v. *United States*, *supra*, 174 U. S., at 61. Nothing we hold here is to the contrary. The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine. Compare *Motes* v. *United States*, *supra*, 178 U. S., at 474. There are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses. The case before us, however, does not present any situation like those mentioned above or others analogous to them. Because the transcript of

Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips, its introduction in a federal court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment. Since we hold that the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding, it follows that use of the transcript to convict petitioner denied him a constitutional right, and that his conviction must be reversed.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 577.—October Term, 1964.

Bob Granville Pointer, Petitioner, *v.* State of Texas.	On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[April 5, 1965.]

Mr. Justice Harlan, concurring in the result.

I agree that in the circumstances the admission of the statement in question deprived the petitioner of a right of "confrontation" assured by the Fourteenth Amendment. I cannot subscribe, however, to the constitutional reasoning of the Court.

The Court holds that the right of confrontation guaranteed by the Sixth Amendment in federal criminal trials is carried into state criminal cases by the Fourteenth Amendment. This is another step in the onward march of the long-since discredited "incorporation" doctrine (see, *e. g.*, Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949); Frankfurter, Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746 (1965)), which for some reason that I have not yet been able to fathom has come into the sunlight in recent years. See, *e. g.*, *Mapp* v. *Ohio*, 367 U. S. 643; *Ker* v. *California*, 374 U. S. 23; *Malloy* v. *Hogan*, 378 U. S. 1.

For me this state judgment must be reversed because a right of confrontation is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 325, reflected in the Due Process Clause of the Fourteenth Amendment independently of the Sixth.

While either of these constitutional approaches brings one to the same end result in this particular case, there is a basic difference between the two in the kind of future constitutional development they portend. The concept of Fourteenth Amendment due process embodied in *Palko* and a host of other thoughtful past decisions now rapidly falling into discard, recognizes that our Constitution tolerates, indeed encourages, differences between the methods used to effectuate legitimate federal and state concerns, subject to the requirements of fundamental fairness "implicit in the concept of ordered liberty." The philosophy of "incorporation," on the other hand, subordinates all such state differences to the particular requirements of the Federal Bill of Rights (but see *Ker* v. *California*, *supra*, at 34) and increasingly subjects state legal processes to enveloping federal judicial authority. "Selective" incorporation or "absorbtion" amounts to little more than a diluted form of the full incorporation theory. Whereas it rejects full incorporation because of recognition that not all of the guarantees of the Bill of Rights should be deemed "fundamental," it at the same time ignores the possibility that not all phases of any given guaranty described in the Bill of Rights are necessarily fundamental.

It is too often forgotten in these times that the American federal system is itself constitutionally ordained, that it embodies values profoundly making for lasting liberties in this country, and that its legitimate requirements demand continuing solid recognition in all phases of the work of this Court. The "incorporation" doctrines, whether full blown or selective, are both historically and constitutionally unsound and incompatible with the maintenance of our federal system on even course.

SUPREME COURT OF THE UNITED STATES

No. 577.—October Term, 1964.

Bob Granville Pointer, Petitioner, v. State of Texas. | On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[April 5, 1965.]

Mr. Justice Stewart, concurring.

I join in the judgment reversing this conviction, for the reason that the petitioner was denied the opportunity to cross-examine, through counsel, the chief witness for the prosecution. But I do not join in the Court's pronouncement which makes "the Sixth Amendment's right of an accused to confront the witnesses against him . . . obligatory on the States." That questionable *tour de force* seems to me entirely unnecessary to the decision of this case, which I think is directly controlled by the Fourteenth Amendment's guarantee that no State "shall deprive any person of life, liberty, or property, without due process of law."

The right of defense counsel in a criminal case to cross-examine the prosecutor's living witnesses is "[o]ne of the fundamental guarantees of life and liberty," [1] and "one of the safeguards essential to a fair trial." [2] It is, I think, as indispensable an ingredient as the "right to be tried in a courtroom presided over by a judge." [3] Indeed, this Court has said so this very Term. *Turner* v. *Louisiana*, 379 U. S. 466, 472–743.[4]

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[1] *Kirby* v. *United States*, 174 U. S. 47, 55.

[2] *Alford* v. *United States*, 282 U. S. 687, 692.

[3] *Rideau* v. *Louisiana*, 373 U. S. 723, 727.

[4] See also *In re Murchison*, 349 U. S. 133, where the Court said that "due process requires as a minimum that an accused be given a public trial after reasonable notice of the charges, have a right to examine witnesses against him, call witnesses on his own behalf, and be represented by counsel." 349 U. S., at 134.

Here that right was completely denied. Therefore, as the Court correctly points out, we need not consider the case which could be presented if Phillip's statement had been taken at a hearing at which the petitioner's counsel was given a full opportunity to cross-examine. See *West* v. *Louisiana*, 194 U. S. 258.

SUPREME COURT OF THE UNITED STATES

No. 577.—October Term, 1964.

Bob Granville Pointer, Petitioner, v. State of Texas. | On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[April 5, 1965.]

Mr. Justice Goldberg, concurring.

I agree with the holding of the Court that "the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." *Ante*, at —. I therefore join in the opinion and judgment of the Court. My Brother Harlan, while agreeing with the result reached by the Court, deplores the Court's reasoning as "another step in the onward march of the long-since discredited 'incorporation' doctrine," *ante*, at —. Since I was not on the Court when the incorporation issue was joined, see *Adamson* v. *California*, 332 U. S. 46, I deem it appropriate to set forth briefly my view on this subject.

I need not recapitulate the arguments for or against incorporation whether "total" or "selective." They have been set forth adequately elsewhere.[1] My Brother

[1] See *Adamson* v. *California*, *supra*, at 59 (concurring opinion of Mr. Justice Frankfurter); *id.*, at 68 (dissenting opinion of Mr. Justice Black); *Malloy* v. *Hogan*, 378 U. S. 1; *id.*, at 14 (dissenting opinion of Mr. Justice Harlan); *Gideon* v. *Wainwright*, 372 U. S. 335, 345 (concurring opinion of Mr. Justice Douglas); *id.*, at 349 (concurring opinion of Mr. Justice Harlan); *Poe* v. *Ullman*, 367 U. S. 497, 509 (dissenting opinion of Mr. Justice Douglas); Frankfurter, Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746; Black, The Bill of Rights, 35 N. Y. U. L. Rev. 865 (1960); Brennan, The Bill of Rights and the States, 36 N. Y. U. L.

BLACK'S view of incorporation has never commanded a majority of the Court, though in *Adamson* it was assented to by four Justices. The Court, in its decisions has followed a course whereby certain guarantees "have been taken over from the early articles of the Federal Bill of Rights and brought within the Fourteenth Amendment," *Palko* v. *Connecticut*, 302 U. S. 319, 326, by a process which might aptly be described as "a process of absorption." *Ibid.* See *Cohen* v. *Hurley*, 366 U. S. 117, 154 (dissenting opinion of MR. JUSTICE BRENNAN); Brennan, The Bill of Rights and the States, 36 N. Y. U. L. Rev. 761 (1961). Thus the Court has held that the Fourteenth Amendment guarantees against infringement by the States the liberties of the First Amendment,[2] the Fourth Amendment,[3] the Just Compensation Clause of the Fifth Amendment,[4] the Fifth Amendment's privilege against self-incrimination,[5] the Eighth Amendment's prohibition of cruel and unusual punishments,[6] and the Sixth Amendment's guarantee of the assistance of counsel for an accused in a criminal prosecution.[7]

With all deference to my Brother HARLAN, I cannot agree that this process has "come into the sunlight in re-

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Rev. 761 (1961); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949); Green, The Bill of Rights, the Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869 (1948); Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 Yale L. J. 74 (1963).

[2] See, *e. g.*, *Gitlow* v. *New York*, 268 U. S. 652, 666; *De Jonge* v. *Oregon*, 299 U. S. 353, 364; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293, 296; *New York Times Co.* v. *Sullivan*, 376 U. S. 254.

[3] See *Wolf* v. *Colorado*, 338 U. S. 25; *Mapp* v. *Ohio*, 367 U. S. 643.

[4] *Chicago, B. & Q. R. Co* v. *Chicago*, 166 U. S. 226.

[5] *Malloy* v. *Hogan*, 378 U. S. 1.

[6] *Robinson* v. *California*, 370 U. S. 660.

[7] *Gideon* v. *Wainwright*, 372 U. S. 335.

cent years." *Ante*, at ——. Rather, I believe that it has its origins at least as far back as *Twining* v. *New Jersey*, 211 U. S. 78, 99, where the Court stated that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226." This passage and the authority cited make clear that what is protected by the Fourteenth Amendment are "rights," which apply in every case, not solely in those cases where it seems "fair" to a majority of the Court to afford the protection. Later cases reaffirm that the process of "absorption" is one of extending "rights." See *Ker* v. *California*, 374 U. S. 23; *Malloy* v. *Hogan*, *supra*, and cases cited by MR. JUSTICE BRENNAN in his dissenting opinion in *Cohen* v. *Hurley*, *supra*, at 156. I agree with these decisions, as is apparent from my votes in *Gideon* v. *Wainwright*, 372 U. S. 335; *Malloy* v. *Hogan*, *supra*, and *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, and my concurring opinion in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 297, and I subscribe to the process by which fundamental guarantees of the Bill of Rights are absorbed by the Fourteenth Amendment and thereby applied to the States.

Furthermore, I do not agree with my Brother HARLAN that once a provision of the Bill of Rights has been held applicable to the States by the Fourteenth Amendment, it does not apply to the States in full strength. Such a view would have the Fourteenth Amendment apply to the States "only a watered-down subjective version of the individual guarantees of the Bill of Rights." *Malloy* v. *Hogan*, *supra*, at 10–11. It would allow the States greater latitude than the Federal Government to abridge concededly fundamental liberties protected by the Constitution. While I quite agree with Mr. Justice Brandeis

that "[i]t is one of the happy incidents of the federal system that a . ... state may . . . serve as a laboratory; and try novel social and economic experiments," *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 280, 311 (dissenting opinion), I do not believe that this includes the power to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights. My Brother HARLAN'S view would also require this Court to make the extremely subjective and excessively discretionary determination as to whether a practice, forbidden the Federal Government by a fundamental constitutional guarantee is, as viewed in the factual circumstances surrounding each individual case, sufficiently repugnant to the notion of due process as to be forbidden the States.

Finally, I do not see that my Brother HARLAN'S view would further any legitimate interests of federalism. It would require this Court to intervene in the state judicial process with considerable lack of predictability and with a consequent likelihood of considerable friction. This is well illustrated by the difficulties which were faced and were articulated by the state courts attempting to apply this Court's now discarded rule of *Betts* v. *Brady*, 316 U. S. 455. See Green, *supra*, at 897–898. These difficulties led the Attorneys General of 22 States to urge that this Court overrule *Betts* v. *Brady* and to apply fully the Sixth Amendment's guarantee of right to counsel to the States through the Fourteenth Amendment. See *Gideon* v. *Wainwright*, *supra*, at 336. And, to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. In my view this promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism.

I adhere to and support the process of absorption by means of which the Court holds that certain fundamental guarantees of the Bill of Rights are made obligatory on the States through the Fourteenth Amendment. Although, as this case illustrates, there are differences among members of the Court as to the theory by which the Fourteenth Amendment protects the fundamental liberties of individual citizens, it is noteworthy that there is a large area of agreement both here, and in other cases, that certain basic rights are fundamental—not to be denied the individual by either the state or federal governments under the Constitution. See, *e. g.*, *Cantwell* v. *Connecticut*, 310 U. S. 296; *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449; *Gideon* v. *Wainwright*, *supra*; *New York Times Co.* v. *Sullivan*, *supra*; *Turner* v. *Louisiana*, 379 U. S. 466.